

Appendix "A."

The following is all the testimony there is concerning the legal relationship between the deceased Amacker and the petitioner, Skelly Oil Company. Said company is sometimes referred to below by its name and sometimes as defendant. Respondents are referred to as plaintiffs.*

This testimony concerns, (a) the terms, express and implied, of the contract, which was oral, between the defendant Skelly Oil Company, owner of the tanks, and Gibbins & Heasley, Inc., the general employer of Amacker and his co-worker Pruitt on the first day and his coworker Price on the second day; also the testimony which shows (b) who actually directed and supervised the work and workmen; (c) who had the responsibility for attaining the ultimate result of the work; (d) who furnished the tools; (e) who was recognized by the workmen as the master; and (f) the nature of the work, that is whether manual only or involving special skill.

We have endeavored to make an orderly arrangement of what we copy regardless of the order in which it was introduced.

J. P. GIBBINS, a witness for defendant, testified that his company, Gibbins & Heasley, Inc., headquarters at Midland, Texas, is and has been since 1935 in the oil well servicing contractor business (R. 315), has worked for many oil companies in the West Texas oil fields (R. 326-327), and has worked for Skelly Oil Company since 1935 (R. 325).

On cross examination by Mr. Watts, one of plaintiffs' attorneys, he testified in part (R. 325-326):

Q. "Was your work performed under written contract with Skelly Oil Company?

A. I don't believe so.

Q. There have been some individual contracts that you have had with them on different pieces of work?

- A. Well, I don't remember. We might have had some, laying pipeline or something like that.
- Q. But you never had any contract with them with reference to the work you performed cleaning out tanks?
- A. All we would have on that would be our verbal agreement.
- Q. That was hourly work, wasn't it?
- A. Hourly work.
- Q. You did not furnish any equipment on this job, did you, that Mr. Amacker was injured on?

Mr. Whitaker: Provided the witness knows. I don't think the witness had anything to do with this particular transaction at all.

The Court: Of course, he will not testify to something he does not know perhaps. Overrule the exception to the question.

- A. Well, I don't know on this particular job. If they call us for any tools we furnish them; if they don't we would not.
- Q. When they ask for tools you send them, and when they don't you just send men?
- A. That is right. If they ask for men we will send men, whatever they want."

ROSS REDDING, a witness for plaintiffs, testified by deposition in part as follows:

Questions by Mr. Watts (R. 99-103).

- Q. "By whom are you employed?
- A. Gibbins & Heasley, Incorporated.
- Q. What duties do you perform for Gibbins & Heasley?
- A. I am field superintendent.
- * * * * *
- Q. For what purpose did you hire Mr. Amacker?
- A. Roustabouting, which is general oil field work.
- * * * * *

[APPENDIX]

Q. Did you have any conversation with anyone representing the Skelly Oil Company in connection with furnishing them any employees for any purpose on or about July 20th, or prior thereto, 1940?

A. Nothing other than the regular labor we had been furnishing.

* * * * *

Q. Under what circumstances had you been furnishing Skelly Oil Company labor?

A. Mr. Rhodes[†] would phone in of a morning and tell me how many men he wanted and I would send them to him.

Q. Did he tell you what job he wanted them on?

A. Yes.

Q. And you had been doing that since March of 1940?

A. To my knowledge, yes.

Q. Is that all he would tell you, that he wanted so many men?

A. And the kind of labor there was to do.

Q. Was there a written contract between Gibbins & Heasley and the Skelly Oil Company with reference to getting the men?

A. None to my knowledge.

Q. Did you ever send anything besides the men?

A. Often we would furnish a pick-up and tools.

Q. Often you would?

A. Yes.

Q. On what kind of jobs?

A. General roustabout work. Sometimes in connection with tank cleaning or anything that might be doing.

Q. When you furnished the tools would you or not send a foreman?

A. Yes.

Q. Did Mr. Rhodes advise you when he would want a foreman and when he wouldn't want one?

[†]Defendant's district foreman. (R. 93)

A. Yes.

Q. He would?

A. Yes.

* * * * *

Q. Was labor all he called for?

A. Yes.

Q. When he wanted tools would he call for labor and tools?

A. That's right.

Q. On this clean-up job for the Skelly that Mr. Amacker was injured on? You furnished no tools?

A. I furnished no tools.

Q. Why didn't you?

A. I wasn't asked for any.

Q. The main reason you didn't was because Mr. Rhodes didn't ask for any tools?

A. Mr. Rhodes didn't ask for any. I had a gas mask available if my men asked for it.

Q. You testified a while ago that Mr. Rhodes, when he wanted them, he would ask for them as well as labor?

A. That's right.

Q. The only thing he requested when he told you to get Mr. Amacker was labor?

A. Yes.

Q. Did Mr. Rhodes tell you he was going to be there and supervise the operation of cleaning out the tank?

A. No, he didn't state that.

Q. Did you send any foreman along with this crew?

A. I had—neither of the men were designated as foreman."

A. L. RHODES, district foreman for Skelly Oil Company (R. 93), testified by deposition taken and introduced by plaintiffs, in part as follows:

[APPENDIX]

Questions by Mr. Watts (R. 96-99).

- Q. "What connection did you have with Elmer O'Neal Amacker?
- A. Not any with the exception that he rode up with me the day prior to his accident, his illness, and the date of his illness. I did not hire him. I presume Gibbins & Heasley did; he was on their payroll. Gibbins & Heasley sent me a crew to work under me.
- Q. Who gave the orders on the job?
- A. I told the men the kind of work that was to be done and as far as being with them continually, I wasn't with them continually, all of the time.
- Q. Was there a Gibbins & Heasley company foreman in charge of the crew?
- A. No.
- Q. Who was in charge of the Gibbins & Heasley crew?
- A. The men did the work where there was just one or two in the crew and I was there with them while the work was being done, part of the time.
- Q. What was the first thing that brought to your mind that Mr. Amacker had become ill, as you say?
- A. He was working in a tank adjoining the one that I was working in. Mr. Broom, Clyde Broom, came to the tank where I was working and said, 'Something is wrong with one of the men.' So I came out and noticed that Mr. Amacker was acting like he was sick. He was standing up by the side of the tank. I asked him how he felt. He said his legs were weak, that he felt weak.
- Q. What did Mr. Broom tell you when he came to you?
- A. He came and said there was something wrong with one of the men.
- * * * * *
- Q. Did you provide them with any tools by which the

tank could be cleaned from the *outside*? (Emphasis supplied.) (Note)

A. No, sir.

* * * * *

Q. How many were in the crew that Mr. Amacker was working with?

A. Two.

Q. How many men were working with the crew under you for the Skelly?

A. On the job?

Q. Yes?

A. Two men was all that was doing work at that time, with the exception of myself. I did work on another job.

Q. Mr. Amacker was working for Gibbins & Heasley, wasn't he?

A. Yes, sir.

Q. Did you have any men in your crew who were working for Skelly?

A. No, sir.

Q. None at all?

A. Nobody except myself."

Questions by Mr. Turpin, one of defendant's counsel
(R. 179-182).

Q. "What did the job consist of, Mr. Rhodes?

A. The kind of work?

Q. Yes.

A. Taking off the dome plate, the center dome plate, and taking the manhole plate, and taking one sheet off of the top of the tank, and connecting up the pump and raking out the sediment, the tank sediment.

Q. How many tanks were there to clean out on that lease?

A. We were to clean out two.

NOTE: The cleaning in question was done from inside the tanks.

[APPENDIX]

- Q. Did you say that this job started on the 18th of July, 1940?
- A. The 18th or 19th of July, 1940.
- Q. Mr. Amacker worked from the beginning of the job?
- A. Yes, sir.
- Q. The tank that Mr. Watts has been questioning you about, was that the first or second tank that was cleaned out?
- A. The second tank.
- Q. Second? Had Mr. Amacker worked on cleaning out another tank on this lease?
- A. Yes, sir.
- Q. Where was it located?
- A. The adjoining tank to where he became injured, at the time that he became injured.
- Q. How was the first tank cleaned out?
- A. In the same manner, with a paddle, pulling the tank bottom sediments to the transfer pump.
- Q. On that first tank in what way was the tank opened?
- A. The manhole plate had been taken off, the center dome plate had been taken off, and a sheet of the tank had been raised with a board, to get circulation through the tank.
- Q. Did Mr. Amacker work on doing that job?
- A. Yes.
- Q. How was the second tank, which is the tank that Mr. Watts has heretofore asked you about, opened?
- A. In the same manner exactly as the first tank was that we cleaned.
- Q. Did Mr. Amacker work on the first job, the first tank?
- A. Yes.
- Q. Did he have a gas mask when he went in the first time?
- A. He didn't.
- Q. What work did he do on the first tank?

A. He went into the tank and paddled the bottom sediments, or B. S. or murk to the front of the tank where the transfer pump picked it up.

* * * * *

Q. During that four hours it took to clean out the first tank, was Mr. Amacker in and out of the tank during all of that time?

A. He was.

Q. Was Mr. Pruitt in and out of the first tank during all of that period?

A. He was.

Q. Did Mr. Amacker and Mr. Pruitt ever both go into the tank at the same time?

A. No, sir.

Q. When was the cleaning out of the first tank completed, about what time of day?

A. About three o'clock.

Q. When that was done what did Mr. Amacker and Mr. Pruitt do?

A. We had in the meantime partly taken off the man-hole plate on the adjoining tank, the second tank, and we started to cleaning it after the first tank was finished."

Q. (R. 184-185:) "You would say eight or ten minutes was the usual interval that he stayed in the tank?

A. Yes, that was—they used their own judgment about how long they would stay in the tank and that is about the length of time they would stay in. Eight or ten minutes.

* * * * *

Q. On the first day you worked on that second tank, did you ever tell Mr. Amacker to go into the tank?

A. I did not.

Q. On the second day you worked on that tank did you ever instruct Mr. Amacker to go into the tank?

A. I did not.

- Q. Did you ever instruct, on that first day, Mr. Pruitt to go into the tank?
- A. I did not.
- Q. On the second day did you ever instruct Mr. Price to go into the tank?
- A. No.
- Q. I believe you testified that you quit work that first day about four-fifty?
- A. I did.
- Q. What did you do then?
- A. We picked up our tools and then came in for the day.
- Q. Did you leave that second tank open?
- A. We did."
- Q. (R. 187:) "Did Mr. Amacker work in the work of cleaning out this eight or ten inches?
- A. Yes.
- Q. And that was done, all of that was done on the first day of cleaning?
- A. The first ten and a half inches had been removed the first day we worked at cleaning the tank.
- Q. And it had been removed by 4:50 p. m. of the afternoon of the first day's operations? Is that correct?
- A. It is.
- Q. And at about after 10 a. m. of the next day Mr. Amacker went back into the tank to clean out the last two inches?
- A. He did.
- Q. Had the tank been open during all of that time, between the ceasing of operations the day before, and the beginning on that morning?
- A. It had been.
- Q. How long was Mr. Amacker in that tank the morning of the second day?
- A. I judge some three or four minutes.
- Q. Did you take Mr. Amacker to the lease that morning?

A. I did."

Q. (R. 189:) "At one-thirty p. m., when they finished cleaning the first tank, how long had that first tank been opened?"

A. We taken the manhole plate off, the center dome plate and one sheet of the top and started cleaning the tank immediately."

Q. (R. 190:) "Were you in charge for the Skelly Oil Company out there?"

A. Yes.

Q. Do you have the power to discharge employees for the Skelly Oil Company?"

A. Yes, sir.

Q. Do you have the power to hire employees for the Skelly Oil Company?"

A. I don't.

Q. Who hires them?"

A. Mr. Hunt.

Q. Where is he located?"

A. At Monahans.

Q. And did Mr. Hunt have any supervision or anything to do with Mr. Amacker or any of the crew that was working with Mr. Amacker for Gibbins & Heasley, at the time that Mr. Amacker became ill?"

A. He did not.

Q. You were the sole representative at that time, or not, for the Skelly Oil Company?"

A. Yes, I was."

Plaintiffs introduced in rebuttal the following portions of the deposition of said witness A. L. RHODES:

Q. (R. 413:) "Did you do anything other than supervise the work that was being done?"

A. No.

* * * * *

[APPENDIX]

Q. Did you attempt to exercise control over Mr. Amacker as to how his work was being performed?

A. No." (Note)

Q. (R. 414-415:) "Who furnished the equipment on the job on which the tank was to be cleaned out?

A. I taken my tools, or the Skelly Oil Company's tools.

Q. What kind of equipment did you furnish Mr. Amacker?

A. I furnished him with a transfer pump and the wrenches that are necessary to do the work.

* * * * *

Q. Did anyone other than you, representing the Skelly Oil Company have anything to do with this work that Mr. Amacker and his crew were doing?

A. No, sir.

Q. Were you in charge for the Skelly Oil Company out there?

A. Yes.

* * * * *

Q. You were the sole representative at that time or not, for the Skelly Oil Company?

A. Yes, I was."

CLYDE BROAM, a witness for defendant, was, at the time of the second trial, employed by Stanolind Oil & Gas Company as a pumper and switcher on its Ford lease adjoining Skelly's Ford lease, and was doing like work on Skelly's lease. In July, 1940, the time involved in this suit, the Stanolind Ford lease belonged to the Barnsdall Company and Broam was then employed by the Barnsdall, and, under a like arrangement he was then also working on the

NOTE: This answer of Mr. Rhodes, when considered in the light of his other testimony, shows merely that he did not exercise control over the immaterial details of Amacker's work. See, *Southern Surety Co. v. Shoemaker*, (Civ. App. Tex.) 16 S. W. (2d) 950, first column of page 952, and cases there cited. See, also, the remarks of Judge WALLER concerning this testimony in his dissenting opinion at top of page 495 of the Record. (140 F. (2d) 21, 23.)

Skelly Ford lease. (See R. 258-259 and 276.) He testified in part as follows:

Examination by Mr. Whitaker, one of defendant's counsel.

Q. (R. 261-262:) "Do you know how the tank was opened, when the tank was opened that morning, for the men to go in and clean?"

A. The first morning?

Q. Yes, sir.

A. Yes, sir.

Q. Who did that?

A. Mr. Rhodes and Clyde Pruitt and Mr. Amacker."

Q. (R. 266:) "Was the second tank now the one on the extreme left,—which was the second tank cleaned?"

A. This one here (indicating).†

Q. Was that opened that day or next day?

A. Opened that day.

Q. What time of day?

A. Right after lunch.

Q. Who did it?

A. Mr. Amacher and myself.

Q. How did you open it?

A. The same way as we had the first one."

Q. (R. 270-271:) "Were you there at any time next day?"

A. Yes, sir.

Q. When?

A. Next morning about 10 o'clock.

Q. Did Mr. Amacker come back?

A. Yes, sir.

* * * * *

Q. Who came back with him?

A. Mr. Price and Mr. Rhodes.

Q. Mr. Rhodes, Mr. Amacker and Mr. Price?

†A plat is here referred to by the witness, possibly the one at R. 393, tank No. 57395. (See R. 271)

[APPENDIX]

A. That is right."

Q. (R. 278:) "Suppose you are going to clean out a tank, not for the purpose of treating or painting it but just to relieve the B. S. so that it won't interfere with the flow of the oil into the pipeline, then is it customary to go in the tanks, or is that done without going in?

A. Just average you can do it without going in.

Q. Do you know why these tanks were being cleaned?

A. They were going to paint them with tar on the inside."

HAYMON V. PRICE, employed for a number of years by Gibbins & Heasley, Inc., testified by deposition, as plaintiff's first witness. (R. 20) He and Amacker were the men who were furnished by Gibbins & Heasley the second day, July 20, 1940; Price was in lieu of Pruitt who had worked with Amacker the first day, July 19. He testified in part as follows:

Questions by Mr. Watts:

Q. (R. 21-23:) "Who was working on the job with you and Mr. Elmer O'Neal Amacker, if you remember?

A. Handling tools?

Q. Who all was there, if you remember?

A. Mr. Rhodes.

Q. Who was Mr. Rhodes?

A. He was, why I guess he was rated as farm boss, isn't he?

Q. Who for?

A. For the Skelly.

Q. Now who carried you to work on or about July 20th, 1940?

A. Mr. Rhodes.

Q. Who did you ride to work with?

A. Mr. Rhodes and Mr. Amacker.

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Q. Did you have any discussion with him (Amacker)

at any time with reference to going into the tank at the time that he was getting ready to go into the tank?

A. Well, yes. The only question along that line, he beat me to the boots and I asked, he was putting the boots on, and I asked him if he would rather I would go in first, and——

Q. What did he say?

A. He said no, he had them partly on and he would go on in.

* * * * *

Q. What were you fellows doing to this tank?

A. Cleaning the B. S. out.

Q. What is B. S.?

A. It is settlement from oil.

Q. Is this the same Mr. Rhodes that you referred to awhile ago?

A. Yes, he worked for Skelly.

Q. What did he tell him, that is, Mr. Rhodes?

A. He told him to get his boots and go in the tank and get to cleaning it out."

Q. (R. 25-26:) "Had you performed other work for Gibbins & Heasley?

A. Yes.

Q. On other jobs had—what was your custom with reference to Gibbins & Heasley furnishing you tools?

A. Other companies furnishing them?

Q. I mean on other jobs did Gibbins & Heasley furnish the tools on other jobs, or not?

A. They did on other jobs where they paid for them.

Q. Yes?

A. But they didn't ask for that. The job was did through roustabout scale and where Gibbins & Heasley sent a man on a job, a foreman on the job, why they furnished the tools.

Q. Yes?

[APPENDIX]

- A. But Gibbins & Heasley didn't have any foreman on the job.
- Q. And did Gibbins & Heasley furnish any tools on this occasion, on the occasion that Mr. Amacker was injured?
- A. No.
- Q. Was there any gas mask there that you saw?
- A. No.
- Q. There was nothing out there but the tank and the boots?
- A. That's right, and the paddle to roll it out with."
- Q. (R. 27:) "Yes? What happened then?
- A. I laid him down there and just about the time that I got him there this pumper[†] walked by.
- Q. Then what did you all do?
- A. Well, the pumper, I told him to tell Rhodes to get there. He was around on the other end of the battery and he came on around there and so we began working his arms and it seemed like life was leaving him."
- Q. (R. 29:) "Now who was it that told you to go out on the job with Rhodes?
- A. Ross Redding. He was field superintendent. He was field superintendent for Gibbins & Heasley.
- * * * * *
- Q. Now on these—had you ever had to go by the warehouse to get tools while working for Gibbins & Heasley?
- A. Yes, when we went on jobs when we used their equipment.
- * * * * *
- Q. You were not given any instructions to go by that day and get tools?
- A. No."

[†]Evidently he refers to Clyde Broom.

